STATE REGULATION OF INTERSTATE COMMERCE.— The difficulties attending any exact division of power where the state and federal governments have concurrent jurisdiction are nowhere more apparent than in the cases involving the state control of interstate commerce. Chief Justice Marshall in 1824 first established the supremacy of the federal power to regulate interstate commerce, under the "commerce clause" of the Constitution,[1] but his decision did not embrace the right of the several states to act during the inaction of Congress.[2] On this point many and varying views were expressed,[3] and no general principle was definitely formulated until 1851. In that year the Supreme Court recognized that the power of Congress to regulate commerce between the states includes many subjects, some imperatively demanding a uniform rule, and some that are in their nature local and may be regulated by the states during the non-action of Congress.[4] Since that decision state regulation has generally been exercised through the agency of two functions of government, the taxing power and the police power.

No state can compel an individual or corporation to pay for the privilege of engaging in interstate commerce within its territory, this being a direct burden.[5] But a state may impose ordinary property taxes on property having a *situs* within its territory, although that property be employed in interstate commerce, for the burden in such a case is incidental;[6] and this power includes a tax on the corporate franchise.[7] The fact that a company is engaged in interstate commerce does not, however, relieve it from a charge for all property expropriated for its own use.[8] The only burden, then, that the state can impose by taxation is that which is primarily of a local nature.

A more frequent subject of litigation is as to the exercise by the state of its police power. This is usually exercised with respect to matters that concern the public health, safety, or morals; but it includes the control, so far as it becomes necessary for the protection of the public interest, of corporations engaged in the public service.[9] Thus, a regulation that all locomotive engineers shall pass a state examination as to their ability to distinguish colors is evidently primarily intended to safeguard the citizens of the state, and is not in conflict with the "commerce clause."[10] And much of the difficulty in determining more intricate cases may be eliminated if it be borne in mind that the states never intended to delegate their entire power of making regulations concerning the rights, duties, and liabilities of their citizens, but simply gave to Congress the power to make these regulations uniform in so far as they should affect interstate commerce.[11] So a state may forbid the running of freight trains on Sunday,[12] or may provide that carriers cannot by contract relieve themselves altogether of their common law

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[1] Art. I, § 8.
[2] Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1.
[3] See The License Cases, 5 How. (U. S.) 504; The Passenger Cases, 7 How. (U. S.) 283.
[4] Cooley *v.* The Port Wardens of Phila., 12 How. (U. S.) 299.
[5] McCall *v.* California, 136 U. S. 104.
[6] Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194.
[7] Western Union Telegraph Co. *v.* Gottlieb, 190 U. S. 412.
[8] St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92.
[9] Munn *v.* Illinois, 94 U. S. 113.
[10] Nashville, etc., R. R. *v.* Alabama, 128 U. S. 96.
[11] Sherlock *v.* Alling, 93 U. S. 99, 103.
[12] Hennington *v.* Georgia, 63 U. S. 299.

liability for loss.[13] In a recent case it was held that a shipper against whom a carrier had discriminated might bring *mandamus* in a state court to compel the railroad to perform its common law duty.[14] *Mo. Pac. R. R.* v. *Larabee Mill Co.*, 29 Sup. Ct. Rep. 214 (Jan. 11, 1909). The court distinguishes another recent decision [15] on the ground that there a direct burden was imposed on interstate commerce, while in the principal case the state was merely exercising its police power in a manner that incidentally burdened such commerce. A further distinction would seem to appear in that in the McNeill case the regulation was made by a state board, while the Interstate Commerce Commission was created to make just such regulations; so Congress could fairly be said to have acted, thereby excluding action by such state board.

THE LAW OF THE CASE. — In a recent case it was held on a second appeal to an intermediate court, after the former appeal had resulted in a remand for a new trial under certain rulings, that the trial court erred in following an intervening decision of the highest court inconsistent therewith. *District of Columbia* v. *Brewer*, 37 Wash. L. Rep. 65 (D. C., Ct. App., Jan. 5, 1909). While the inferior courts would, of course, be bound by such decision in subsequent cases, the opinion holds that the rulings are final as to the case in which they are given in the intermediate and trial courts. This is an application of the so-called doctrine of *the law of the case*, a doctrine that the rulings of a court of last appeal conclusively settle the law as to the case in which they are given, not only in the lower courts, but also in the court giving them. The principal case applies it to the rulings of an intermediate court when that is the last court to which appeal is taken. And the rule is supported by the weight of authority to that extent.[1]

For orderly procedure inferior courts must be bound by the decision of their supreme court in the particular case. But the situation becomes somewhat startling when the supreme court applies the rule to itself and refuses on subsequent appeal to correct its former mistakes. The explanation is that a suit must be ended somewhere, and that it seems worth while to curtail litigation at the expense of a misdecision in isolated cases. Whether this should extend to the rulings of the last intermediate court to which appeal is prosecuted seems to depend on whether the defeated party by accepting a new trial on the basis of those rulings has lost his right to appeal therefrom. If he has not, the rule does not logically apply, because it rests on the ground that the holdings in question are the last word in the case on that issue, and the only practical result of its application would be to force the parties to further proceedings to attain precisely the same result. If he has, the decision of the intermediate court stands on the same footing

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[13] Chic. Milw. & St. P. R. R. *v.* Solan, 169 U. S. 133.

[14] Mr. Justice Holmes concurred on the ground that the cars had not yet been appropriated to interstate commerce. *Cf.* Norfolk & W. R. R. *v.* Comm., 93 Va. 749.

[15] McNeill *v.* Southern R. R., 202 U. S. 543, which held unconstitutional a regulation imposed by a state railway board, that certain classes of freight should be delivered to the consignees on spur tracks.

[1] Ogle *v.* Turpin, 8 Ill. App. 453; note in 34 L. R. A. 321–347; 26 Am. & Eng. Encyc., 2 ed., 184.